

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

ARDIE DEAN FISHER, #1267667 §
VS. § CIVIL ACTION NO. 6:08cv380
DIRECTOR, TDCJ-CID §

ORDER ADOPTING REPORT AND RECOMMENDATION

The Court referred the above-entitled and numbered civil action to United States Magistrate Judge Judith K. Guthrie. The Magistrate Judge presented for consideration the Magistrate Judge's Report, containing proposed findings of fact and recommendations for disposition of this case. Petitioner filed objections to the Report.

This Court made a *de novo* review of Petitioner's objections. On September 28, 2004, Petitioner was convicted of aggravated assault, after pleading not guilty. The conviction was affirmed on appeal. Petitioner says that his petition for discretionary review was stricken on March 8, 2006. On May 17, 2007, Petitioner filed a state court habeas petition, which was denied on July 13, 2007.

Petitioner's application for writ of habeas corpus asserts that he received ineffective assistance of appellate counsel because counsel negligently failed to notify him that his petition for discretionary review had been struck and failed to re-file it, and thereby denied him the opportunity to file a petition for discretionary review. Petitioner contends that because of his attorney's ineffective assistance, Petitioner is entitled to equitable tolling.

Ineffective assistance of counsel is irrelevant to the tolling decision. *United States v. Riggs*,

314 F.3d 796, 799 (5th Cir. 2002), *cert. denied* 539 U.S. 952. Mere attorney error or neglect is not an extraordinary circumstance such that equitable tolling is justified. *Salinas v. Dretke*, 354 F.3d 425, 431 (5th Cir. 2004), *cert. denied* 541 U.S. 1032. Petitioner has not shown grounds for equitable tolling.

This Court has determined that Petitioner's objections lack merit. This Court finds that the Magistrate Judge's conclusions are correct, and adopts them as the Court's findings and conclusions. The Court therefore

ORDERS, ADJUDGES, and DECREES that this action is **DISMISSED WITH PREJUDICE**;

ORDERS that Petitioner is **DENIED** a certificate of appealability; and,

ORDERS that all motions not previously ruled on are denied.

So ORDERED and SIGNED this 12th day of November, 2008.

A handwritten signature in black ink, appearing to read 'Leonard Davis', written over a horizontal line.

LEONARD DAVIS
UNITED STATES DISTRICT JUDGE